(3)

No. 06-344

IN THE
Supreme Court of the United States

MINERAL COUNTY, TOWN OF SUPERIOR, ST. REGIS SCHOOL DISTRICT, SUPERIOR SCHOOL DISTRICT NO. 3, MONTANA COALITION OF FOREST COUNTIES and TRICON TIMBER LLC,

Petitioners,

v.

ECOLOGY CENTER, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF *AMICUS CURIAE* OF AMERICAN FOREST RESOURCE COUNCIL, AMERICAN FOREST & PAPER ASSOCIATION, ALASKA FOREST ASSOCIATION, ASSOCIATED OREGON LOGGERS, CALIFORNIA FORESTRY ASSOCIATION, INTERMOUNTAIN FOREST ASSOCIATION, MONTANA LOGGING ASSOCIATION, MONTANA WOOD PRODUCTS ASSOCIATION, NORTHWEST MINING ASSOCIATION AND WASHINGTON CONTRACT LOGGERS ASSOCIATION IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Does the National Environmental Policy Act, 42 U.S.C. §§4321 et seq., or the National Forest Management Act, 16 U.S.C.§1604(g)(3)(B), impose on the U.S. Forest Service a procedural requirement to conduct long-term, on-the-ground research to definitively conclude there will be beneficial effects to wildlife from thinning trees in old growth stands before deciding to conduct such a project to improve forest health, reduce the risk of wildfire and safely reintroduce prescribed fire?

2. Does the National Environmental Policy Act, 42 U.S.C. §§4321 et seq., impose on the U.S. Forest Service a procedural and substantive requirement to collect on-site soil data for every timber harvest unit before it completes the final environmental impact statement?

3. Does the National Forest Management Act, 16 U.S.C.§1604(g)(3)(B), impose a "mandate to maintain wildlife viability" on the U.S. Forest Service?

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INTEREST OF *AMICI CURIAE*[1]

The Ninth Circuit 2-1 decision in this case creates an intrusive new standard for judicial review of federal agency action under the Administrative Procedures Act (APA), 5 U.S.C. §706(2)(A) – which abandons the deference to agencies commanded by this Court's well-settled precedents. This new standard gives courts in the nine-state region unprecedented power to overturn U.S. Forest Service decisions approving ecosystem restoration, fire management, timber, mining and grazing projects on the 122 million acres[2] of the national forest system located in the nine-state region.

This ruling, based on the National Environmental Policy Act (NEPA), 42 U.S.C. §§4321 et seq., and the National Forest Management Act (NFMA), 16 U.S.C.§§1601 et seq., is certain to accelerate the current flood[3] of environmental litigation in the Ninth Circuit that has resulted from a series of recent Ninth Circuit decisions under NEPA, NFMA and other federal environmental laws. Many of these recent NEPA and NFMA decisions, which (at least as of now) reach an apogee with this case, have compelled the Forest Service to repeatedly revise and expand the environmental reviews it conducts before proceeding with each and every one of the thousands of pending and planned land management projects it conducts in the nine-state circuit, often requiring lengthy and expensive new environmental reviews of projects that have already been exhaustively analyzed.

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[1]The parties' letters of consent to the filing of this brief are lodged with the Clerk. Pursuant to this Court's Rule 37.6, the *amici* submitting this brief and their counsel hereby represent that no party to this case nor their counsel authored this brief in whole or in part, and that no person other than *amici* paid for or made a monetary contribution toward the preparation and submission of this brief.

[2]*See* http://www.fs.fed.us/land/staff/lar/LAR04/table4 (last visited November 3, 2006) for documentation of state-by-state acreage.

[3]Westlaw searches show that since January 1, 2002 there have been over 450 district court environmental decisions within the Ninth Circuit – some 250 under NEPA and 200 more under NFMA, the Endangered Species Act, 16 U.S.C. §§1531 et seq., Clean Water Act, 33 U.S.C. §§1251 et seq., or Federal Land Policy and Management Act, 43 U.S.C. §§1701 et seq., not coupled with a NEPA claim. The pace is accelerating: in 2005 and 2006 there have been over 240 such decisions.

This seemingly-endless analytical loop (often called "paralysis by analysis") has disrupted, delayed and in many cases completely blocked urgent Forest Service ecological restoration projects necessitated by recent catastrophic wildfires in western states and other urgent land management actions, which in turn has threatened severe harm to the environment itself. As the dissenting judge below stated: "Inaction or delay threatens the species Ecology Center seeks to protect [and] may harm old-growth areas." Pet. App. 35a. The very same "inaction or delay" also harms the families, towns and enterprises within the Ninth Circuit who treasure a healthy environment and rely on national forest system resources that the Forest Service has found increasingly difficult to manage properly.

The *amici* represent many of these citizens:

Amicus American Forest Resource Council is a trade association based in Portland, Oregon comprised of approximately 90 lumber and plywood manufacturers and forest landowners in the states of Oregon, Washington, Idaho, California, Montana, Arizona and six other western states that rely upon the purchase of timber from the national forest system for some or all of the raw material supply required to operate their processing facilities. Most of its members are family-owned companies, many in the third generation, deeply rooted within the rural communities in which they operate.

Amicus American Forest & Paper Association (AF&PA) is a national trade association based in Washington, D.C. comprised of approximately 115 member companies that grow, harvest and process wood and wood fiber from public and private land; manufacture pulp, paper and paperboard products from both virgin and recovered fiber; and produce solid wood products. AF&PA is also the umbrella for more than 60 affiliate member associations around the country that reach out to more than 10,000 companies. Many of its member companies and many more members of its association members rely on the purchase of timber from the national forest system for some or all of the raw material required to operate their facilities, and many forest landowning members rely on timely management of national forest lands to assure that risks from wildfire and insect infestation do not threaten their adjacent land.

Amicus Alaska Forest Association is a trade association of about 140 wood product manufacturers, logging and road building companies, marine and surface transportation companies and related enterprises, many family-owned, that operate throughout Alaska including many in Southeast Alaska. Since about 85% of all forest lands in Southeast Alaska are controlled by the Forest Service, many of the association's members rely on the national forest system to provide most or all of the timber required to maintain wood product manufacturing. The welfare of these family-owned businesses is directly related to the Forest Service's ability to actively manage national forest system lands in Alaska.

Amicus Associated Oregon Loggers is a trade association of approximately 1,100 contract loggers and businesses associated with the logging industry in Oregon, virtually all family-owned enterprises, who rely on the 15 national forests in the state (25% of the state's land base) for a substantial portion of their work and economic livelihoods.

Amicus California Forestry Association is a trade association of approximately 200 wood product companies and forest landowners including ninety percent of California's primary forest products manufacturers, who serve as the engine of a forest products industry in California that generates more than $15 billion in annual sales from production and processing and provides total employment exceeding 220,000 workers. Many of its manufacturing members rely on timber from California's 19 national forests (20% of the state's land base) to maintain the economic viability of their timber processing facilities.

Amicus Intermountain Forest Association is a trade association of 35 wood product manufacturers, forest landowners and related enterprises, many family-owned, operating in Idaho, Montana, Washington, Oregon and South Dakota. Many of its members rely in particular on timber from the 15 national forests in Idaho (39% of Idaho's land base) and the 11 national forests in Montana (18% of Montana's land base) for a major component of their timber supply.

Amicus Montana Logging Association represents nearly 600

family-owned businesses that harvest and/or transport timber from forest to mill in Montana. Since about two-thirds of Montana's forest lands are controlled by the Forest Service, the welfare of these family-owned businesses is directly related to the Forest Service's ability to actively manage national forest system lands in Montana.

Amicus Montana Wood Products Association is a trade association of 16 companies and individuals involved in all facets of the wood products industry in Montana and other western states. Its members all have a strong interest in the national forest system because the state, private and tribal lands in Montana can only provide about half of the timber supply needed to maintain the industry in the state.

Amicus Northwest Mining Association (NWMA) is a 1,500 member trade association based in Spokane, Washington whose membership encompasses every facet of the mining industry including geology, exploration, mining, engineering, equipment manufacturing, technical services and sales of equipment and supplies. NWMA members operate in each of the nine states within the Ninth Circuit and 22 other states, and are actively involved in exploration and mining operations on national forest system lands, especially in the West.

Amicus Washington Contract Loggers Association is a trade association of 980 logging companies who harvest timber on private and public lands in the State of Washington, and have traditionally relied on timber from the nine national forests in the state (21% of the state's land base) to generate a major component of their income.

The *amici* have a strong interest in this case because they and their members are often at the bottom of the environmental litigation food chain, with limited or no right to participate in NEPA lawsuits,[4] but suffering the full brunt of litigation-driven disruptions

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[4]Much of the Ninth Circuit's NEPA jurisprudence has developed at the exclusion of *amici*, their members and others seeking to support federal agency NEPA decisions because the Ninth Circuit has forged a unique rule of law denying district court intervention as of right to *amici* and other citizens who seek to support the government in a NEPA case, except in the remedial phase after a decision on the merits has been rendered. *See, e.g., Wetlands Action Network v. U.S. Army Corps*

in natural resource decision-making. When a national forest is enjoined from selling fire-scarred timber to local sawmills that have no other available wood supply, it is not the Forest Service employees who suffer but rather the men and women working on the mill's "green chain" who see production suspended and their jobs cut, as well as the family-owner of the sawmill who has spent a lifetime supporting his community, creating jobs and supplying the American homebuilding industry. When litigation blocks mining on a national forest, the Forest Service employees still get paid, but the mining company employees and owners lose their livelihood.

SUMMARY OF ARGUMENT

The Court should grant the petition for review in this case because the Ninth Circuit decision further extends that circuit's increasingly aberrant NEPA jurisprudence, departs from this Court's well-settled precedents, and creates a conflict with nine other circuits by fashioning a new, sharply-reduced standard of deference courts must give predictive scientific judgments of the Forest Service (and presumably other federal agencies) in APA judicial review.

Under the new Ninth Circuit deference standard: 1) a court may give no deference to a predictive scientific judgment of Forest Service experts unless the agency first validates the predictive judgment through "on-the-ground" verification; and 2) a plaintiff is never required to meet any burden of proof, either at the administrative level or in court proceedings, to obtain such non-deferential judicial review.

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of Eng'rs, 222 F.3d 1105, 1114 (9th Cir. 2000), *cert. denied*, 534 U.S. 815 (2001). *Amici* and their members are often barred from participating in NEPA cases in the Ninth Circuit under this rule. *E.g., Oregon Natural Desert Ass'n v. Shuford*, -F.Supp.2d-, 2006 WL 2601073 (D. Or. September 8, 2006); *Sierra Nevada Forest Prot. Campaign v. Tippin*, -F.Supp.2d-, 2006 WL 1319397 (E.D. Cal. May 15, 2006). *Amici*'s inability to participate in lower court NEPA litigation in the Ninth Circuit makes review by this court even more important to protecting their interests.

REASONS FOR GRANTING THE PETITION

THE DECISION BELOW FURTHER EXTENDS THE NINTH CIRCUIT'S INCREASINGLY ABERRANT NEPA JURISPRUDENCE BY SEVERELY REDUCING THE DEFERENCE A COURT MUST GIVE A FEDERAL AGENCY'S PREDICTIVE SCIENTIFIC JUDGMENTS, CONTRARY TO THIS COURT'S PRECEDENTS AND IN CONFLICT WITH RULINGS OF NINE OTHER CIRCUITS.

A. The Court should exercise its supervisory powers to constrain the remarkable and growing divergence between the Ninth Circuit's aberrant NEPA jurisprudence and the law of all the other circuits.

There is a compelling need for the Court to exercise its supervisory powers to achieve greater uniformity of environmental jurisprudence generally, and NEPA jurisprudence specifically, between the Ninth Circuit and the other circuits. S. Ct. Rule 10(a).

This Court has previously reviewed five Ninth Circuit NEPA decisions – and in all five cases, unanimously reversed the Ninth Circuit ruling.[5] In the same period the Court has reviewed seven other Ninth Circuit environmental decisions, unanimously reversing four of these decisions,[6] reversing two additional decisions with

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[5] *Dep't of Transp. v. Public Citizen*, 541 U.S. 752 (2004); *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429 (1992) (NEPA and NFMA); *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360 (1989); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989); *Weinberger v. Catholic Action of Hawaii/Peace Educ. Project*, 454 U.S. 139 (1981).

[6] *Bennett v. Spear*, 520 U.S. 154 (1997) (Endangered Species Act); *Meghrig v. KFC Western, Inc.*, 516 U.S. 469 (1996) (Resource Conservation and Recovery Act (RCRA), 49 U.S.C. §§6901 et seq.); *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531 (1987) (Alaska National Interest Lands Conservation Act, 16 U.S.C. §1320); *Costle v. Pacific Legal Foundation*, 445 U.S. 198 (1980) (Clean Water Act).

dissents[7] and affirming just one.[8] Yet this steady stream of corrective review has not constrained the Ninth Circuit from developing, especially in recent years, a uniquely activist environmental jurisprudence under NEPA, NFMA and other laws that contrasts sharply with the law in the other courts of appeals, and fluctuates so rapidly that the district courts within the Ninth Circuit are unable to apply correct legal principles more than half the time.

This divergence is particularly apparent for the Forest Service, which manages national forests in 40 states located in every one of the 11 geographically-based circuits, and is headquartered in Washington, D.C. The Forest Service follows the same laws and regulations in every national forest, relies on a single Office of General Counsel to interpret those laws and regulations, and performs similar land management duties throughout the country. Forest Service managers routinely move from forest to forest and region to region, so there are no regional differences to legal interpretations. Although the Forest Service gets sued in every circuit, its litigation record in the Ninth Circuit is remarkably worse than in the rest of the country.

From January 1, 2002 to November 1, 2006, the Ninth Circuit decided appeals in 37 cases against the Forest Service claiming a violation of NEPA, NFMA or both laws. In the district court, the Forest Service prevailed in 35 of these cases, while citizen litigants won just two. In the Ninth Circuit, however, the citizen litigants were able to win reversal of those district court rulings in 20

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[7] *Lyng v. Northwest Indian Cemetery Prot. Ass'n*, 485 U.S. 539 (1988) (reversing Ninth Circuit application of Free Exercise Clause to block construction of Forest Service Road); *California Coastal Com'n v. Granite Rock Co.*, 480 U.S. 572 (1987) (reversing Ninth Circuit preemption ruling concerning Federal Land Policy and Management Act and Coastal Zone Management Act, 16 U.S.C.§§ 1451 et seq.).

[8] *Hallstrom v. Tillamook County*, 493 U.S. 20 (1989) (affirming Ninth Circuit jurisdictional interpretation of notice provision in RCRA).

cases,[9] w[illegible] the Ninth Circuit affirmed district court rulings for Forest Se[illegible] in only 15 cases.[10] Thus, in more than half the NEPA and NFMA appeals, the Ninth Circuit found that the district court had applied its precedents incorrectly, and in every case ruled against

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[9]*Oregon Natural Desert Ass'n v. U. S. Forest Serv.*, -F.3d-, 2006 WL 2691392 (9th Cir. September 21, 2006); *Earth Island Inst. v. Ruthenback*, 459 F.3d 954 (9th Cir. 2006) (aff'g in part and remanding in part 376 F.Supp.2d 994 (E.D. Cal. 2005)); *Earth Island Inst. v. U.S. Forest Serv.*, 442 F.3d 1147 (9th Cir. 2006); *Natural Res. Def. Council v. U.S. Forest Serv.*; 421 F.3d 797 (9th Cir. 2005); *Native Ecosystems Council v. U.S. Forest Serv.*, 418 F.3d 953 (9th Cir. 2005); *Ecology Ctr. v. Kimbell*, 143 Fed. Appx. 793 (9th Cir. 2005); *Hells Canyon Preservation Council v. U.S. Forest Serv.*, 403 F.3d 683 (9th Cir. 2005); *Headwaters v. U.S. Forest Serv.*, 399 F.3d 1047 (9th Cir. 2005); *Lands Council v. Powell*, 395 F.3d 1019 (9th Cir. 2005), amending and superseding 379 F.3d 738, 752 (9th Cir. 2004); *High Sierra Hikers Ass'n v. Blackwell*, 390 F.3d 630 (9th Cir. 2004); *Earth Island Inst. v. U.S. Forest Serv.*, 351 F.3d 1291 (9th Cir. 2004); *Laub v. U.S. Dep't of Interior*, 342 F.3d 1080 (9th Cir. 2003); *Citizens for Better Forestry v. U.S. Dep't of Agric.*, 341 F.3d 961 (9th Cir. 2003); *Pearson v. Powell*, 96 Fed. Appx. 466 (9th Cir. 2004); *Ctr. for Biological Diversity v. U.S. Forest Serv.*, 349 F.3d. 1157 (9th Cir. 2003); *Selkirk Conservation Council v. Forsgren*, 336 F.3d 944 (9th Cir. 2003); *Furey v. U.S.*, 61 Fed. Appx. 399 (9th Cir. 2003); *League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Forsgren*, 309 F.3d 1181 (9th Cir. 2002); *Idaho Sporting Cong. v. Rittenhouse*, 305 F.3d 957 (9th Cir. 2002); *Native Ecosystems Council v. Dombeck*, 304 F.3d 886 (9th Cir. 2002); *Idaho Sporting Cong. v. Alexander*, 45 Fed. Appx. 788 (9th Cir. 2002); *Neighbors of Cuddy Mountain v. Alexander*, 303 F.3d 1059 (9th Cir. 2002). All compilations are based on decisions reported in Westlaw.

[10]*Forest Conservation Council v. U.S. Forest Serv.*, - Fed. Appx.-, 2006 WL 2844573 (9th Cir. October 5, 2006); *Alaska Envtl. Ctr. v. Kempthorne*, 457 F.3d 969 (9th Cir. 2006); *Envtl. Prot. Info. Ctr. v. U.S. Forest Serv.*, 451 F.3d 1005 (9th Cir. 2006); *Sierra Nevada Forest Prot. Campaign v. U.S. Forest Serv.*, 166 Fed. Appx. 923 (9th Cir. 2006); *Bear Creek Council v. Heath*, 153 Fed. Appx. 435 (9th Cir. 2005); *Cascades Wildlands Project v. Conroy*, 159 Fed. Appx. 769 (9th Cir. 2005) (aff'g district court); *Native Ecosystems Council v. U.S. Forest Serv.*, 428 F.3d 1233 (9th Cir. 2005); *Ecology Ctr. v. Castaneda*, 426 F.3d 1144 (9th Cir. 2005); *Grant School Dist. No. 3 v. Dombeck*, 126 Fed. Appx. 823 (9th Cir. 2005); *Cold Mountain v. Garber*, 375 F.3d 884 (9th Cir. 2004); *Forest Conservation Council v. U.S. Forest Serv.*, 110 Fed. Appx. 26 (9th Cir. 2004); *Forest Guardians v. U.S. Forest Serv.*, 329 F.3d 1089 (9th Cir. 2003); *Native Ecosystems Council v. U.S. Forest Serv.*, 54 Fed. Appx. 901 (9th Cir. 2003); *Forest Guardians v. Plant & Animal Inspection Serv.*, 309 F.3d 1141 (9th Cir. 2002); *Montana Snowmobile Ass'n v. Wildes*, 26 Fed. Appx. 762 (9th Cir. 2002).

the Forest Service.

In the rest of the country, the Forest Service record is far better. In the same period, the other 11 circuits decided 22 appeals of district court NEPA or NFMA rulings in Forest Service cases. At the district court level, the Forest Service prevailed in all 22 cases. On appeal, the citizen litigants were able to obtain reversals in seven cases,[11] while the Forest Service won affirmances in 16 cases.[12]

Thus, even though the Forest Service uniformly applied the same set of laws and regulations throughout the country, the agency lost 22 of 37 cases in the Ninth Circuit, but lost only seven times in 23 cases in the other 11 circuits. In both absolute numbers and proportions of adverse rulings against the Forest Service, the Ninth

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[11] *Ouachita Watch League v. Jacobs*, 463 F.3d 1163 (11th Cir. 2006); *Cherokee Forest Voices v. U.S. Forest Serv.*, 182 Fed. Appx. 488 (6th Cir. 2006); *Ecology Ctr. v. U. S. Forest Serv.*, 451 F.3d 1183 (10th Cir. 2006) (affirming dismissal on merits of NEPA claim but reversing and remanding on NFMA claim); *Utah Envtl. Cong. v. Bosworth*, 439 F.3d 1184 (10th Cir. 2006); *Forest Watch v. U.S. Forest Serv.*, 410 F.3d 115 (2d Cir. 2005); *Utah Envtl. Cong. v. Bosworth*, 372 F.3d 1219 (10th Cir. 2004); *Northwoods Wilderness Recovery, Inc. v. U.S. Forest Serv.*, 323 F.3d 405 (6th Cir. 2003).

[12] *Northwoods Wilderness Recovery, Inc. v. U.S. Dep't of Agric. Forest Serv.*, -Fed. Appx.-, 2006 WL 2189118 (6th Cir. July 28, 2006); *Utah Envtl. Cong. v. Bosworth*, 443 F.3d 732 (10th Cir. 2006); *Colorado Wild, Heartwood v. U.S. Forest Serv.*, 435 F.3d 1204 (10th Cir. 2006); *Silverton Snowmobile Club v. U.S. Forest Serv.*, 433 F.3d 772 (10th Cir. 2006); *Allegheny Def. Project, Inc. v. U.S. Forest Serv.*, 423 F.3d 215 (3d Cir. 2005); *Ctr. for Biological Diversity v. Lueckel*, 417 F.3d 532 (8th Cir. 2005); *Bensman v. U.S. Forest Serv.*, 408 F.3d 945 (7th Cir. 2005); *Wyoming Sawmills, Inc. v. U.S. Forest Serv.*, 383 F.3d 1241 (10th Cir. 2004), *cert. denied*, -U.S.-, 126 S. Ct. 330 (2005); *Heartwood, Inc. v. U.S. Forest Serv.*, 380 F.3d 428 (8th Cir. 2004); *Colorado Off Highway Vehicle Coal. v. U.S. Forest Serv.*, 357 F.3d 1130 (10th Cir. 2004); *Hannon v. Clark*, 70 Fed. Appx. 519 (10th Cir. 2003); *Indiana Forest Alliance, Inc. v. U.S. Forest Serv.*, 325 F.3d 851 (7th Cir. 2003); *Tulare County v. Bush*, 306 F.3d 1138 (D.C. Cir. 2002), *cert. denied*, 540 U.S. 813 (2003); *Citizens Comm. to Save Our Canyons v. U.S. Forest Serv.*, 297 F.3d1012 (10th Cir. 2002); *Utah Shared Access Alliance v. U.S. Forest Serv.*, 288 F.3d 1205 (10th Cir. 2002).

Circuit is in a different legal universe than the rest of the country.[13]

Amici have no judicial recourse except this Court to curb the Ninth Circuit's aberrant environmental jurisprudence. The Ninth Circuit has never granted a request from the government or an industry intervenor for *en banc* review in an environmental case, despite many requests for it to do so.[14]

B. The Ninth Circuit's new deference standard departs sharply from this Court's precedents.

This Court has well-settled rules prescribing the deference a reviewing court undertaking traditional "arbitrary and capricious" review under the APA must give a federal agency's scientific judgments made while exercising authority assigned to it by Congress: When "analysis of the relevant documents 'requires a high level of technical expertise,' we must defer to 'the informed discretion of the responsible federal agencies.'" *Marsh v. Oregon Natural Res. Council*, 490 U.S. at 378, quoting *Kleppe v. Sierra Club*, 427 U.S. 390, 412 (1976). When a scientific determination is challenged, "a reviewing court must generally be at its most deferential." *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 103 (1983). "When specialists express

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[13]Nor is the Forest Service in any way unique. The Ninth Circuit has reversed district court NEPA rulings in favor of other federal agencies or rejected agency NEPA analysis at least 16 times since 2002, at an increasing rate. *See, e.g., IlioUlaokalani Coalition v. Rumsfeld*, 464 F.3d 1083, 2006 (9th Cir. 2006) (Army must evaluate environmental effects of location for combat force battalion transformation); *Great Basin Mine Watch v. Hankins*, 456 F.3d 955 (9th Cir. 2006)(Bureau of Land Management NEPA analysis for mine permit approval did not individually discuss cumulative effect of each nearby mine); *San Luis Obispo Mothers for Peace v. Nuclear Reg. Com'n*, 449 F.3d 1016 (9th Cir. 2006) (Commission must evaluate risk of terrorist attack in environmental impact statement for nuclear plant licensing).

[14]It appears the Ninth Circuit has in its entire history granted *en banc* review in only one environmental case, reversing a panel decision in favor of a federal agency and granting relief to a conservation group that had sought *en banc* review. *The Wilderness Soc'y v. U.S. Fish and Wildlife Serv.*, 353 F.3d 1051 (9th Cir. 2003), amended, 360 F.3d 1374 (9th Cir. 2004), vacating 316 F.3d 913 (2003).

conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive." *Marsh v. Oregon Natural Res. Council*, 490 U.S. at 378. "The presumption of regularity supports the official acts of public officers and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties." *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926).

The Ninth Circuit majority created and applied a completely new deference standard to the Forest Service decision in this case to proceed with a post-wildfire treatment project on the Lolo National Forest in Montana that includes "commercial thinning of small diameter timber and prescribed burning in old-growth forest stands, as well as salvage logging of burned and insect killed timber in various areas of the forest." Pet. App. 3a. The majority's new deference standard disregards this Court's precedents and creates a direct conflict with nine other circuits. As the dissenting judge observed, the result of the majority's new deference standard is that the court "crossed the line from reviewer to decisionmaker." Pet. App. 26a. "[T]he majority changes our posture of review to one where we sit at the table with Forest Service scientists and second-guess the minutiae of the decisionmaking process." Pet. App. 28a. The dissenting judge also found that the majority's new standard "is contrary to the basic principle that we reverse agency decisions only if they are arbitrary and capricious," Pet. App. 36a, and concluded that "the majority has, in effect, displaced 'arbitrary and capricious' review for a more demanding standard." Pet. App. 27a.

The majority's new deference standard has two elements:

1. A reviewing court may give no deference to a predictive scientific judgment of Forest Service experts, including a judgment based on a computer model developed by Forest Service experts, unless the agency first validates the predictive scientific judgment through "on-the-ground" verification. Pet. App. 9a, Pet. App. 24a (describing elements of required validation process); and
2. A plaintiff is never required to meet any burden of proof,

either at the administrative level or in court proceedings, to obtain such non-deferential judicial review of a Forest Service decision. Pet. App. 7a.

Under its new deference standard, the majority found the Forest Service's predictive scientific judgments in this case are entitled to no deference, and the Forest Service decision based on those judgments is unlawful under NEPA and NFMA:

1. No "on-the-ground" verification means no deference to predictive scientific judgments. The Forest Service's scientific experts determined that the planned treatment would benefit certain "old-growth dependant species" found within the project area including the black-backed woodpecker. Pet. App. 6a-8a, 12a. The majority found the Forest Service decision unlawful because "the Forest Service's conclusion that treating old-growth forest is beneficial to dependent species is predicated on an unverified hypothesis," Pet. App. 9a, and "NFMA 'require[s] that the hypothesis and prediction of the model be verified with observation.'" *Id.*, quoting *Lands Council v. Powell*, 379 F.3d at 752.[15] "While the Service's predictions may be correct, the Service has not yet taken the time to test its theory with any 'on the ground analysis' ...." *Id.* The majority held that no deference is due the agency's preference for the predictions of its own experts over opposing experts because none of the experts on either side had "studied the effects" of the proposed action, and since their disagreement only involves "differing hypotheses regarding the effects" of the proposed action, the agency experts should receive no deference. Pet. App. 10a-11a. A similar lack of deference led the majority to find the Forest Service decision unlawful under NEPA because the Forest Service environmental impact statement (EIS) treated the experts' prediction "as a fact instead of an untested and

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[15]The majority cited no specific section of NFMA that requires on-the-ground verification, but relied solely on the earlier Ninth Circuit *Lands Council* decision which also fails to cite any such section of NFMA. The court gave no deference to the Forest Service's contrary interpretation of NFMA that has long allowed reliance on models and predictions without on-the-ground validation, and the court failed to even acknowledge any need for such deference.

debated hypothesis." Pet. App. 12a.

The majority not only required the Forest Service to validate its predictions on-the-ground, but also dictated what information the Forest Service would need to validate the predictions, and required it to be "reasonably certain" of its conclusions:

> [O]ne must know where the threshold between "critical" and "sufficient" levels of burned habitat lies ... [and] how much further habitat levels have to drop before the species is downgraded from sensitive to threatened or how the Service plans to generate additional black-backed woodpecker habitat to counter-balance losses from salvaging, the passage of time, and ongoing fire-suppression efforts.

Pet. App. 16a-17a.

The majority also dictated the procedures the Forest Service must follow to support the required findings: 1) the Forest Service must make available to the public the data "from which a Forest Service expert derived her opinion," Pet. App. 17a, quoting *Idaho Sporting Cong. v. Thomas*, 137 F.3d 1146, 1150 (9th Cir. 1998); 2) the agency's EIS must contain the most definitive information available on the viability issue or provide "a justification regarding why more definitive information could not be provided," Pet. App. 16a, quoting *Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1372, 1380 (9th Cir. 1998); and 3) the Forest Service must "undertake further scientific study" to resolve any scientific uncertainty unless "it explain[s] in the EIS why such an undertaking [wa]s not necessary or feasible." Pet. App. 12a, quoting *Seattle Audubon Soc'y v. Espy*, 998 F.2d 699, 704 (9th Cir. 1993).

The majority also used the lack of on-the-ground validation as its basis for refusing to give any deference to spreadsheet computer models the Forest Service used to predict soil conditions in the areas to be treated: "The 'Forest Service's reliance on the spreadsheet models, unaccompanied by on-site spot verification of the model's predictions, violated NFMA.'" Pet. App. 20a, quoting *Lands Council v. Powell*, 379 F.3d at 752-53.

The dissenting judge sharply disputed the legal validity of the majority's "on-site spot verification" requirement:

> [T]here is no legal basis to conclude that the NFMA requires an on-site analysis where there is a reasonable scientific basis to uphold the legitimacy of modeling. NFMA does not impose this substantive requirement, and it cannot be derived from the procedural parameters of NEPA.

Pet. App. 28a.

In explaining its lack of deference to Forest Service predictive judgments, the majority compared the decision to treat old-growth stands without prior on-the-ground effects verification to allowing "a pharmaceutical company to market a drug to the general population without first conducting a clinical trial to verify that the drug is safe and effective." Pet. App. 9a. The dissenting judge challenged this analogy and the majority's new deference standard:

> [T]his analogy underscores the degree to which the majority inserts itself into the internal judgments of the Forest Service. The [Food and Drug Administration (FDA)] process dictates a substantive and specific administrative course of action in terms of clinical trials and other requirements as a prelude to the approval of drugs and medical devices. Neither NEPA nor NFMA serve that function in the environmental context. To import the notion of clinical trials from the FDA context to soil sampling in federal forests is a leap too far.

Pet. App. 36a. The dissenter concluded: "The majority's rationale cannot be reconciled with our case law requiring deference to an agency's technical expertise and experience, particularly with respect to questions involving engineering and scientific matters." Pet. App. 36a (citation and quotations omitted).

2. Plaintiff never has a burden of proof to show agency error in administrative or judicial proceedings. The majority acknowledged that plaintiff "Ecology Center does not offer proof

that the proposed treatment causes the harms it fears." Pet. App. 7a. Ecology Center did not challenge the agency's predictions or projections "at the administrative level," Pet. App. 29a, or offer "a credible scientific critique of the methodology" at any point. Pet. App. 32a. The majority nonetheless considered and accepted Ecology Center's argument on appeal, reasoning (with no cited authority) that Ecology Center's failure to meet any burden of proof was irrelevant because the Forest Service has an obligation to provide information in its environmental analysis demonstrating that its proposed project will benefit or be neutral to old growth dependent species. Pet. App. 7a-8a. Even with the conceded absence of any evidence contradicting the Forest Service's decision, the majority extended no presumption of regularity to the agency.

B. The Ninth Circuit's new deference standard conflicts with established law from nine other circuits.

1. Agencies may rely on models and other expert predictive methodologies without first conducting on-the-ground verification.

Unlike the Ninth Circuit in this case, other circuits recognize that scientific and technical predictions by their nature cannot be "verified" in advance, and commonly defer to agency reliance on predictive models and other predictive methodologies that have not undergone on-the-ground verification.

D.C. Circuit: "[A]n agency's predictive judgments about areas that are within the agency's field of discretion and expertise ... need not rest on pure factual determinations." *EarthLink, Inc. v. Fed. Communications Comm'n,* 462 F.3d 1, 12 (D.C. Cir. 2006) (italics and quotation omitted). Administrative agencies "'have undoubted power to use predictive models.'" *Appalachian Power Co. v. Envtl. Prot. Agency*, 249 F.3d 1032, 1052 (D.C. Cir. 2001), quoting *Small Refiner Lead Phase-Down Task Force v. Envtl. Prot. Agency*, 705 F.2d 506, 535 (D.C. Cir.1983). In using a predictive model, an agency has discretion to decide what data to collect, and may consider the "need to avoid an unyielding avalanche of information that might overwhelm the agency's ability to reach a

final decision" as well as the time and burden of "conduct[ing] full modeling with new data." *Village of Bensenville v. Fed. Aviation Admin.*, 457 F.3d 52, 71 (D.C. Cir. 2006).

First Circuit: An agency's use of a model (without on-the-ground verification of its predictions) to evaluate a combination of pollution control measures that are "novel" and "untested" is proper because "the Agency's choice of a model will be sustained if it bears a rational relationship to the characteristics of the data to which it is applied." *Sur Contra La Contaminación v. Envtl. Prot. Agency*, 202 F.3d 443, 448 (1st Cir. 2000) (quotation and citation omitted).

Fourth Circuit: An agency prediction using "recognized scientific models" together with a post-implementation monitoring program is a sufficient "hard look" under NEPA. *Hughes River Water Conservancy v. Johnson*, 165 F.3d 283, 288 (4th Cir. 1999).

Fifth Circuit: "The court's role is to evaluate whether the [agency's] projections represent arbitrary or capricious exercises of its authority, not whether they are accurate." *BCCA Appeal Group v. Envtl. Prot. Agency*, 355 F.3d 817, 832 (5th Cir. 2003). "NEPA does not demand that every federal decision be verified by reduction to mathematical absolutes for insertion into a precise formula." *Sierra Club v. Lynn*, 502 F.2d 43, 61 (5th Cir.1974), *cert. denied*, 421 U.S. 994 (1975) and 422 U.S. 1049 (1975).

Sixth Circuit: "[If] the [agency's] judgment is a predictive one, it cannot necessarily be proven by the record." *Cellnet Communications, Inc. v. Fed. Communications Comm'n*, 149 F.3d 429, 441 (6th Cir. 1998).

Seventh Circuit: "[T]he Forest Service was entitled to use its own methodology to fulfill its obligations unless it was irrational." *Indiana Forest Alliance, Inc. v. U.S. Forest Serv.*, 325 F.3d at 863.

Eighth Circuit: "It is not for this court to second-guess what is the best method of determining [a relevant fact], nor is it this court's role to scrutinize the scientific value of the computerized model. ... The [plaintiffs'] bare assertion that the model was 'seriously flawed' is not a sufficient basis on which this court will disregard the agency's methodology." *Friends of Boundary Waters Wilderness v. Dombeck*, 164 F.3d 1115, 1130 (8th Cir. 1999).

Tenth Circuit: "Here, Ecology Center [the same group that is the respondent in this case] unpersuasively attempts to equate the lack of a 'hard look' with a lack of 'hard data.' Because the Forest Service has conformed with NEPA's procedural requirements, we will not second-guess the wisdom of the ultimate decision." *Ecology Ctr. v. U. S. Forest Serv.*, 451 F.3d at 1190 (citation and quotation omitted). "Courts are not in a position to decide the propriety of competing methodologies ... but instead, should determine simply whether the challenged method had a rational basis and took into consideration the relevant factors." *Silverton Snowmobile Club v. U.S. Forest Serv.*, 433 F.3d at 782 (permissible for Forest Service to assume lynx are present in an area without conducting on-the-ground verification of assumption); *Colorado Envtl. Coal. v. Dombeck*, 185 F.3d 1162, 1170-71 (10th Cir. 1999) (rejecting claim that Forest Service "made assumptions without the necessary background information and failed to make important viability findings").

Eleventh Circuit: An agency projection that is "primarily a question of probabilities [is] peculiarly subject to the expert experience, discretion, and judgment of the [agency]. In making a predictive judgment, the expertise of the [agency] supplements, and may supplant, the projections placed in the record by the parties. ... To hold otherwise would paralyze agencies merely because the future is not subject to proof." *Sunshine State Bank v. Fed. Deposit Ins. Corp.*, 783 F.2d 1580, 1582 (11th Cir. 1986) (italics, quotation and citation omitted).

2. Agency models and other expert predictive methodologies are entitled to particularly great judicial deference.

This court has clearly stated: "[A] reviewing court must [ascertain if] ... [an agency] is making predictions, within its area of special expertise, at the frontiers of science. When examining this kind of scientific determination, as opposed to simple findings of fact, a reviewing court must generally be at its most deferential." *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. at 103. In contrast to the Ninth Circuit, the other circuits have uniformly afforded agency scientific predictions and models the broad discretion commanded by this Court's precedents.

D.C. Circuit: "[W]e will give an extreme degree of deference to the agency when it is evaluating scientific data within its technical expertise." *Huls America, Inc. v. Browner*, 83 F.3d 445, 452 (D.C. Cir.1996) (quotation and citation omitted). Especially great deference is due agency use of computer models because "their scientific nature does not easily lend itself to judicial review." *Appalachian Power Co. v. Envtl. Prot. Agency*, 135 F.3d 791, 802 (D.C. Cir. 1998).

Fourth Circuit: An agency's decision whether to rely on existing models or develop new models requires "most deferential" review. *1000 Friends of Maryland v. Browner*, 265 F.3d 216, 237 (4th Cir. 2001)(quotation and citation omitted). "Agencies are entitled to select their own methodology as long as the methodology is reasonable. Courts must give deference to an agency's decision." *Hughes River Water Conservancy v. Johnson*, 165 F.3d at 289.

Sixth Circuit: "[U]nder the arbitrary and capricious standard of review, an agency's predictive judgments about areas that are within the agency's field of discretion and expertise are entitled to particularly deferential review." *Cellnet Communications, Inc. v. Fed. Communications Comm'n*, 129 F.3d at 441.

Seventh Circuit: "We give great deference to an agency's predictive judgments, especially those within the agency's field of discretion and expertise." *Western Fuels Inc. v. Interstate Commerce Comm.*, 878 F.2d 1025, 1030 (7th Cir. 1989) (citation and quotation omitted).

Tenth Circuit: "[R]eviewing courts should be particularly deferential when they are reviewing an agency's predictive judgments, especially those within the agency's field of discretion and expertise." *Franklin Savings Ass'n v. Dir., Office of Thrift Supervision*, 934 F.2d 1127, 1146 (10th Cir. 1991), *cert. denied*, 503 U.S. 937 (1992). An agency is only required to collect additional information for an EIS if that information is "essential to a reasoned choice among alternatives." *Colorado Envtl. Coal. v. Dombeck*, 185 F.3d at 172, citing 40 C.F.R. §1502.22(a).

3. A party challenging an agency decision has the burden of showing an error by the agency.

In conflict to the Ninth Circuit excusing Ecology Center from meeting any burden to show an error by the Forest Service either during administrative proceedings or in court, other circuits uniformly require a plaintiff to meet such a burden.

D.C. Circuit: " [T]he party challenging an agency's action as arbitrary and capricious bears the burden of proof. ....[T]he burden is on petitioners to demonstrate that [the agency's] ultimate conclusion ... was unreasonable." *City of Olmstead Falls v. Fed. Aviation Admin.*, 292 F.3d 261, 271-72 (D.C. Cir. 2002) (quotations and citations omitted).[16]

Fifth Circuit: "It is the burden of the plaintiffs [under NEPA] to adduce evidence, not merely to make allegations or to rest on assumptions, establishing that the [agency] was [arbitrary and capricious] in reaching the conclusion it did." *Coliseum Square Ass'n, Inc. v . Jackson*, - F.3d -, 2006 WL 2664455 *9 (5th Cir. September 18, 2006) (quotation and citation omitted). "The plaintiffs had the burden of showing by a preponderance of the evidence that the defendants failed to adhere to the requirements of NEPA." *Druid Hills Civic Ass'n v. Fed. Highway Admin.*, 772 F.2d 700, 709 n. 9 (11th Cir. 1985).

Sixth Circuit: "[Plaintiff] has not proffered any evidence, either to us or to the [agency], that [an expected event] has a significant environmental impact. Its conclusory allegation is not sufficient [under NEPA] to withstand the [agency's] motion for summary judgment on this issue." *Commonwealth of Ky. ex rel*

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[16]The D.C. Circuit's decision in *Ne. Maryland Waste Disposal Auth. v. Envtl. Prot. Agency*, 358 F.3d 936, 948 (D.C. Cir. 2004) that in a formal rulemaking process the Environmental Protection Agency "must justify its basic assumptions even if no one objects during the comment period" does not support the Ninth Circuit's decision in this case. NEPA decisions are not formal rulemaking, and a duty to "justify basic assumptions" in a rulemaking is a far cry from a requirement for on-the-ground verification of agency models and predictions.

Beshear v. Alexander, 655 F.2d 714, 720 (6th Cir. 1981).

Seventh Circuit: In a NEPA case brought under the APA, "[t]he party challenging the agency action ... bears the burden of proof." *Sierra Club v. Marita*, 46 F.3d 606, 619 (7th Cir. 1995).

Tenth Circuit: Under NEPA, "the party challenging the agency's decision shoulders the burden of establishing that the [decision] was unreasonable." *Park County Res. Council, Inc. v. U. S. Forest Serv.*, 817 F.2d 609, 621(10th Cir. 1985), *overruled on other grounds, Village of Los Ranchos de Albuquerque v. Marsh*, 956 F.2d 970 (10th Cir.), *cert. denied*, 506 U.S. 817 (1992).

Eleventh Circuit: "We also cannot accept appellants' contention that the district court erred in placing on them the burden of introducing affirmative evidence in court to prove that the assumptions [in an EIS] were incorrect. As plaintiffs in the district court proceeding, appellants were required to establish by a preponderance of the evidence that the EIS was inadequate." *N. Buckhead Civic Ass'n v. Skinner*, 903 F.2d 1533, 1543 (11th Cir. 1990)(footnote omitted).

CONCLUSION

For the foregoing reasons and those stated in the Petition, *amici* respectfully request that the petition for a writ of certiorari be granted.

Respectfully submitted,

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